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No. 00–110

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERRY STEWART, ET AL.,
PETITIONERS,

-vs-

JOE CLARENCE SMITH, JR.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REASONS WHY THE WRIT SHOULD ISSUE

I

SMITH DOES NOT DENY THAT DEFENSE COUNSEL NEVER PRESENTED DR. TATRO'S REPORT TO THE STATE COURTS, AND THAT THE NINTH CIRCUIT RELIED HEAVILY ON THAT REPORT.

Smith attempts to justify the Ninth Circuit's reversal of the district court's grant of summary judgment in favor of the State, and its grant of a new sentencing without an evidentiary hearing, by alleging that its opinion was based on "uncontested facts." Brief in Opposition at 9. He also states:

> The State now claims that they did not have notice of Dr. Tatro's report. This is not true. In the State's pleading following the district court's procedural default rulings, the State discussed the substance of Dr. Tatro's report and argued that it was insufficient to prove prejudice.

Brief in Opposition at 10.

The State did not assert that it *never* learned of the 1987 report. The State contended, and Smith does not dispute it, that *defense counsel never presented that report to the state courts*, and that the trial court held every issue in the third petition for post-conviction relief precluded, and denied relief in 1990 without ever having seen that report. Petition at 12.

Smith's conspicuous inability to deny this fact is extremely significant because Dr. Tatro was the *only* medical expert who noted (8 years after resentencing) any sign of alleged multiple personalities. *The state courts never had the opportunity to consider his report in connection with the argument about ineffective assistance at resentencing because defense counsel did not present it in the third state petition for post-conviction relief.*

When defense counsel filed an amended petition for writ of federal habeas corpus in the district court in 1992, he asserted that trial counsel was ineffective for not having presented lay testimony about alleged multiple personalities. He did *not*, however, allege that counsel was ineffective for not having presented Dr. Tatro. He did not submit Dr. Tatro's 1987 report in support of the merits of the petition or the memorandum accompanying the petition.

In its motion for summary judgment, the State contended that the claim of ineffectiveness at resentencing had been procedurally defaulted. Defense counsel filed a response to that motion on October 25, 1993—but he did *not* include Dr. Tatro's report. In an effort to circumvent procedural bar, defense counsel submitted a memorandum on cause and prejudice on July 15, 1996. For the first time, he attached a copy of Dr. Tatro's 1987 report—*not* in support of the merits argument about ineffective assistance—but in an attempt to demonstrate that a fundamental miscarriage of justice would occur if the district court did not reach numerous defaulted claims.

Rejecting the claim of ineffective assistance on the merits, the district court noted that none of the *experts* who examined Smith prior to trial identified any clinical symptoms of multiple personalities, or any major psychosis. Petition, App. B at 21. For that reason, the trial court would still have imposed the death penalty if trial counsel had presented the *lay* testimony. *Id.* The district court did not mention Dr. Tatro's report in discussing the *merits* because Smith did not rely on it in his amended petition, the accompanying memorandum, or his opposition to the State's motion for summary judgment.[1]

Smith does not deny that, in his briefs to the Ninth Circuit, he never alluded to Dr. Tatro's report. Nevertheless, in reversing the district court's grant of summary judgment in favor of the State, the Ninth Circuit relied heavily on that report. Petition, App. A at 19, 21. That reliance is particularly egregious in view of the fact that no state court

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1. The district court alluded to the report only in rejecting the contention that it established a fundamental miscarriage of justice. Petition, App. B at 8–9.

ever saw the report or had the opportunity to consider it in connection with the argument about ineffective assistance, and that the State never had the chance to test Dr. Tatro's conclusions or to present contrary expert testimony.

Despite Smith's attempt to distinguish this case from *Weisgram v. Marley*, ___U.S. ___, 120 S. Ct. 1011 (2000), he cannot. In that case, Marley repeatedly objected prior to trial, and at trial, to the admissibility of the testimony of Weisgram's expert witnesses, but the district court overruled the objections, and Weisgram prevailed in district court. 120 S. Ct. at 1015–16. Concluding on appeal that the expert testimony should have been excluded, and that the remaining evidence was insufficient as a matter of law to support a verdict in favor of Weisgram, the Eighth Circuit reversed and, pursuant to Rule 50(a), Federal Rules of Civil Procedure, granted Marley judgment as a matter of law.[2] *Id.* at 1016. Affirming, this Court held:

> As *Neely* recognized, appellate rulings on post-trial pleas for judgment as a matter of law call for the exercise of "informed discretion," 386 U.S. at 329, 87 S. Ct. 1072, and *fairness to the parties is surely key to the exercise of that discretion.*

Id. at 1020 (emphasis supplied). The Court noted that, although Weisgram "was on notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence." *Id.* at 1021.

Although Marley had notice of Weisgram's reliance on proposed expert witnesses—and so could timely object in district court—in this case *Smith never put the State on notice, in state or federal court, that he placed any reliance on Dr. Tatro's report in support of his substantive argument on ineffective assistance.* Under those circumstances, it was fundamentally unfair for the Ninth Circuit to use

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2. The standard for granting summary judgment mirrors the standard for directing a verdict as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

that report to grant judgment as a matter of law to Smith, the loser in district court, without giving the State the chance to test those allegations at a hearing, and to present rebuttal evidence.

Contrary to Smith's assertion, the Ninth Circuit's use of a report never submitted to the state courts violates the principle discussed in *Edwards v. Carpenter*, ___U.S.___, 120 S. Ct. 1587 (2000). In *Edwards*, this Court held that a defaulted claim of ineffective assistance cannot serve as cause to excuse another defaulted claim unless the state prisoner can show cause and prejudice to excuse the procedurally defaulted ineffective assistance of counsel claim. 120 S. Ct. at 1591. Moreover, this Court held that the principles of comity and federalism require the defendant to first present the defaulted ineffective assistance claim *to the state courts* as an independent constitutional claim before he can present it to the federal courts as cause to excuse another defaulted claim. *-Id.*

In this case, the district court ruled that Dr. Tatro's report—which was never submitted to the state courts—did not excuse procedural default on numerous issues because it did not satisfy the fundamental miscarriage of justice exception. Petition, App. B at 8–9. The Ninth Circuit *affirmed* that ruling. Petition, App. A at 7. The Ninth Circuit then proceeded to use that *same report* to reverse a grant of summary judgment in the State's favor.

By analogy to *Edwards*, the Ninth Circuit erred egregiously by using a report *never presented to the state courts*—and insufficient to establish a fundamental miscarriage of justice—as the basis for reversing a grant of summary judgment in the State's favor and ordering a new sentencing.

The Ninth Circuit did not, as Smith maintains, simply apply the law to "undisputed facts." Brief in Opposition at 13. Dr. Tatro's 1987 report was never offered to the state courts, so it was not a "fact" considered by them; Smith did not rely on it as a "fact" in support of the merits of his ineffectiveness argument in the district court, and the State had no opportunity to challenge the basis of the unsworn conclusions.

For the reasons stated above, the Court should grant certiorari and, at a minimum, order the Ninth Circuit to remand this case for an evidentiary hearing on the issue of alleged ineffectiveness.

II

THE NINTH CIRCUIT'S OPINION CANNOT BE RECONCILED WITH ITS DECISIONS TO REMAND FOR AN EVIDENTIARY HEARING IN *WALLACE* AND *CORRELL*.

Smith contends that his case is distinguishable from *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999), and *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998), In those Arizona capital cases, as here, the district court granted the State's motion for summary judgment. On appeal, the Ninth Circuit found evidence of ineffective assistance. Instead of automatically granting a new sentencing—as the panel did here—the court remanded to the district court for a hearing to see if the defendants could establish their *Strickland* claims:

> *Because there was no hearing, the State did not have an opportunity to cross-examine Wallace's affiants, or to present evidence of its own. Nor, of course, did the district court make any findings.*. However, were the district court to *accept* all of Wallace's evidence, it *could find* that Wallace's lawyers were ineffective, and conclude that "there is a reasonable probability that the death sentence would not have been imposed" had they been effective. . . . We therefore remand for an evidentiary hearing and findings as to whether Couser and Curtis were ineffective and, if so, whether Wallace was *prejudiced* as a consequence.

Wallace, 184 F.3d at 1118 (9th Cir. 1999) (emphasis supplied).

According to Smith, the distinction between his case and *Wallace* and *Correll* is that the district judges in those cases "refused to consider material facts supporting the . . . claims because they had not been

presented in state court. . . .The district court here considered the undisputed facts supporting relief." Brief in Opposition at 13–14. The record refutes that assertion.

Smith does not deny that he never presented Dr. Tatro's report to the state courts—just as Wallace and Correll did not present their material to the state courts. He also does not deny that he did not present the report to the district court in support of the *merits* of his ineffectiveness claim. He misrepresents the record when he makes the overly broad statement that the "district court here considered the undisputed facts supporting relief." Brief in Opposition at 13–14. While the district court considered the *lay* testimony on multiple personality that Smith had presented to the state courts, the district court did not mention Dr. Tatro's report as support for that substantive argument because defense counsel did not offer it on the merits of that issue. Petition, App. B at 20–21. There is absolutely nothing in the district court's order indicating that it considered Dr. Tatro's report as an "undisputed fact" in support of the merits of the ineffectiveness claim.

Although the Ninth Circuit opinion does not mention that Smith did not present the report to the state courts, or that the district court did not consider it in denying relief on the merits of the ineffectiveness claim, those "indisputable facts" put this case in precisely the same procedural posture as *Wallace* and *Correll*, and highlight the Ninth Circuit's inconsistency and unfairness in treating this case differently from those cases.

There are two distinctions between those cases and Smith's—and both favor the State. The first distinction is that in *Wallace* and *Correll the State knew in district court that the defendants were relying* on the new material to support the *merits* of their ineffectiveness claims, and thus the State had both reason and opportunity to object to the new material *at that level.* The second distinction is that the parties in *Wallace* and *Correll* fully briefed the district court's refusal to consider the new material before the Ninth Circuit. In this case, Smith never argued that the Ninth Circuit should rely on Dr. Tatro's report to grant

relief, so the State had no opportunity to object to something not argued in Smith's briefs.

For the reasons discussed above, this Court should grant certiorari and order the Ninth Circuit to remand this case for an evidentiary hearing in district court to see if Smith can establish the prejudice prong of *Strickland*.

III

STRICKLAND'S REQUIREMENT THAT THE DEFENDANT SHOW *ACTUAL PREJUDICE* DOES NOT PERMIT A FEDERAL COURT TO GRANT A RESENTENCING ON THE BASIS OF SPECULATION ABOUT THE EFFECT OF A REPORT NEVER PRESENTED TO THE STATE COURTS.

The State is aware that a defendant does not have to show "to a certainty" that the sentence would have been different if his attorney had presented certain evidence. He must, however, show a reasonable probability of a different result, a probability sufficient to undermine confidence in the outcome.

The *Strickland* analysis by the majority in this case is skewed. Against the background of *three* powerful aggravating circumstances—any *one* of which suffices to impose the death penalty in Arizona—the majority focuses myopically on Smith's upbringing and alleged "split personality" as sufficient to undermine confidence in the sentence. The problem with that analysis is that the majority concedes that, without *Dr. Tatro's 1987 report*, the one defense counsel never presented to the state courts, the available mitigation would *not* have persuaded the sentencer to impose less than death:

> In addition, other experts were needed to corroborate Dr. Goldberg's testimony . . . . For example, another psychologist, Dr. Donald Tatro, later interviewed Smith, administered tests, and researched his family background. . . . Dr. Tatro concluded

> that Smith had a "split personality," compartmentalizing himself into a "positive" and "negative" self. Smith normally kept these personalities separated but when circumstances caused the two selves to overlap, the conflict became so unbearable that Smith would lose contact with reality, Dr. Tatro explained.
>
> Dr. Tatro showed how Smith's split personality arose from his disturbing family background. . . . Smith developed two sides to his personality to keep his rage at bay. . . .

Smith v. Stewart, 189 F.3d 1004, 1012 (9th Cir. 1999) (citations omitted).

While an unhappy childhood may constitute mitigation, the Arizona Supreme Court has consistently held that it is *not a mitigating circumstance unless the defendant can show a definite causal link between that background and his ability to control his conduct at the time of the offenses*. *State v. Martinez*, 999 P.2d 795, 808–09 (Ariz. 2000) (the evidence did not support the defense expert's diagnosis of PTSD due to an abused childhood; but even if the court assumed that diagnosis was correct, the defendant failed to establish any causal link between his childhood and his actions when he murdered a state trooper); *State v. Greene*, 967 P.2d 106, 117 (Ariz. 1998) (27-year-old defendant failed to show how anything in his background, including his mother's introducing him to methamphetamine, influenced his behavior on the night of the murder); *State v. Jones*, 917 P.2d 200, 219–20 (Ariz. 1996) (although defendant had a chaotic and abusive childhood, that was not mitigating because he did not establish a connection between his childhood and his conduct when he murdered).

The majority cites nothing from Dr. Tatro's report stating that he concluded, to a reasonable medical certainty, that Smith's childhood made it impossible for him to control his behavior when he murdered on two separate occasions. The majority's speculation that Dr. Tatro *might* have supplied the required causal link, and that the trial court *might* have found it *credible* and given it such weight that it would have

substantially outweighed the three aggravating circumstances, is no substitute for the requirement of Arizona law that Smith *prove* the causal link by a preponderance of the evidence.

In the absence of an evidentiary hearing where the State could cross-examine defense witnesses, and present rebuttal evidence, the Ninth Circuit has implicitly assumed, on the basis of a report *never presented to the state courts*, that the following sequence of events would all have flowed uninterruptedly in Smith's favor if the defense had discovered Dr. Tatro and called him to testify at the resentencing in 1979: (1) that the defense would have established, as fact, bare assertions; (2) that the trial court would have found all defense witnesses credible and persuasive, and accepted their conclusions; (3) that the State could not have cross-examined the defense witnesses effectively, or rebutted them with other experts; and (4) that, if the trial court had found the defense witnesses credible, and the evidence to be mitigating, it would have given the evidence such great *weight* that there is a "reasonable probability" that it would have outweighed *three* powerful aggravating circumstances.

In other words, *the majority has assumed what Strickland requires Smith to demonstrate.* The State asserts that *Strickland* does not allow reversal on the basis of speculation, especially when that speculation is based on a report never presented to the state courts.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to grant the petition for writ of certiorari, reverse the Ninth Circuit, and affirm the district court's denial of relief. In the alternative, the State requests that the Court grant certiorari and order the Ninth Circuit to remand the case to the district court for a hearing to determine whether Smith can establish actual prejudice

Respectfully submitted,

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